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Reports of Malaysian Cases

DETERMINED BY

THE HIGH COURTS

AND BY

THE FEDERAL COURT

AND

ON APPEAL THEREFROM TO THE YANG DI-PERTUAN AGONG

FOR THE OPINION OF THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

LAU BROTHERS & CO. v. CHINA PACIFIC NAVIGATION CO. LTD.

[O.C.J. (Lee Hun Hoe J.C.) September 7, 1964]

[Sibu — Civil Case No. 113 of 1963]

Contract — Contract by correspondence — Whole of the correspondence must be taken into consideration.

This was a claim for damages for breach of "a contract for failure to take delivery of logs." It was argued for the plaintiffs that the parties had by the exchange of five telegrams effected a binding contract. Subsequent to the exchange of these telegrams there were letters in which *inter alia* the method of payment was discussed. Eventually the defendants wrote to the plaintiffs informing them that they considered the transaction unsuccessful. The question was whether there was a binding contract.

Held: (1) where a contract is to be found in letters, it is necessary to take the whole of the correspondence into consideration to ascertain whether the parties have come to binding agreement;

(2) in this case the parties were still in state of negotiation and the defendants were justified in withdrawing their offer.

Cases referred to:—

(1) *Hussey* v. *Horne Payne* 4 App. Cas. 311.

(2) *Bristol Cardiff and Swansea Aerated Bread Co.* v. *Maggs* (1890) 44 Ch. D. 616.

(3) *May* v. *Thomson* 20 Ch. D. 705, 723.

CIVIL SUIT.

Lee Wee Gek (Miss) for the plaintiffs.

J. V. Nayar for the defendants.

Cur. Adv. Vult.

Lee Hun Hoe J.C.: This is a claim for damages for breach of a contract for failure to take delivery of logs. Plaintiffs are a firm carrying on business in Sibu. Defendants are a company incorporated in Hong Kong and carry on business in Hong Kong. On 6th August, 1963 plaintiffs initiated an action against defendants. On 19th August, 1963 plaintiffs obtained leave to serve the writ out of jurisdiction. By their defence defendants denied that there was a contract in existence and therefore they were under no obligation to take delivery of the logs. Miss Lee, counsel for plaintiffs and Mr. Nayar, counsel for defendants agree that the preliminary issue is whether there is a binding contract between the parties. Certain agreed documents were submitted and the court was asked to decide whether from these documents there was a contract between the parties.

Miss Lee submitted that five telegrams alone were sufficient to establish a binding contract. By a telegram (Exh. 1) dated 15th March 1964 defendants inquired of plaintiffs as to the price of logs as follows:—

"PLEASE QUOTE FOB 2000 HOPPUSTONS EACH END APRIL AND MAY SHIPMENTS MLH LOG FRESHCUT WITHOUT MARINE BORERS GUARANTEE MEASUREMENT".

Plaintiffs replied by telegram (Exh. 7) quoting price as $46 per hoppus ton in the following terms:—

"YC15 ACCEPTABLE 46 FOB PLEASE CONFIRM STOP AGREE OVER 3% SHORT MEASUREMENT OUR A/C AND GUARANTEE FREE MARINE BORERS."

Defendants then sent another telegram (Exh. 2) offering $44 per hoppus ton as follows:—

"YC16 OFFER FIRM SUBREPLY 21ST 44 FOB."

Plaintiffs accepted offer of $44 per hoppus ton by telegram (Exh. 9) as follows:—

"YC20 44 ACCEPTABLE PLEASE CABLE NAME STEAMER BUT CARGO CAN ONLY BE READY END APRIL 2000T END MAY 2000T PLEASE CONFIRM AND ESTABLISH L/C."

In reply defendants sent the following telegram (Exh. 3):—

"YC21 TEMPORARY ALLOCATE SS FUCHING MIDDLE MAY FOR FIRST SHIPMENT ESTABLISHING L/C END APRIL WHILE SECOND SHIPMENT NOMINATED LATER."

Following the last telegram (Exh. 3) the parties corresponded both by telegrams and letters. On 26th March, 1964, plaintiffs wrote

a letter in Chinese (Exh. 19A) to defendants enclosing a contract (Exh. 31) in duplicate asking defendants to sign and return a copy to them. Exhibit 19B is the agreed translation of Exhibit 19A and reads as follows:—

"Dear Sirs,

We are in receipt of your telegram as follow:—

'YC21 TEMPORARILY ALLOCATE SS FUCHING MIDDLE MAY FOR FIRST SHIPMENT ESTABLISHING LC END APRIL WHILE SECOND SHIPMENT NOMINATING LATER.'

We regret that your above telegram is not very clear to us. Anyhow we hope that you will send us the ship at Tg. Mani for loading and establish L/C at your earliest convenience.

We beg to forward herewith the contract in duplicate. Please sign and return to us a copy in order to comply the formality.

We hope that you will also be able to nominate us as your ship's agents. We shall of course try best to offer our best service.

Yours faithfully,

Lau Sieng Nguong"

The contract (Exh. 31) is a simple form apparently drafted by plaintiffs by using the letter form without proper legal advice. It was signed by plaintiffs as sellers. It is set out below:—

Dated 26th March, 1963.

CONTRACT

Messrs. China Pacific Navigation Co. Ltd., Hongkong as buyers, hereby confirm having purchased from M/s. Lau Brothers & Co., Sibu as sellers, the following goods by the contract of purchase made on the above date and terms and conditions hereinafter set forth:—

Commodity:	Sarawak M.L.H. Logs.
Quality:	Hongkong Quality.
Quantity:	About 4000 (four thousand) tons of 50 cu. ft.
Specification:	Girth: 36" & UP. Length: 12' & longer.
Price:	At M$44.00 (Malayan dollars forty four) per ton of 50 cu. ft. FOB Tg. Mani, Rejang, Sarawak.
Shipment:	1) 2000 tons end April, 1963. 2) 2000 tons end May, 1963.
Payment:	By letter of Credit.

Whereof both parties have hereto set their hands.

Sg. Lau Sieng Nguong

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Sellers. Buyers.

On 4th April, 1964 in reply defendants sent the following letter (Exh. 4):—

"Dear Sirs,

RE: 4,000 Hoppus Tons of
Sarawak M.L.H. Logs

We acknowledge with thanks the receipt of your letter dated March 3rd, 1963 (in Chinese) enclosing therewith a Contract covering the captioned M.L.H. Logs.

We wish to refer you to your cable date 16/3/63 in which you state 'Agree over 3% short measurement our (i.e. your goodselves) account and guarantee from Marine Borers'. But such wordings and guarantee did not appear in the contract concerned, which we insist should be inserted as additional clause.

Due to our previous experience, we shall open an Irrevocable Letter of Credit for 100% of the actual invoice value but you are only allowed to draw 90% upon completion of shipment and the balance 10% can only be negotiated after discharging and against Hongkong Surveyor's measurement lists showing total measurement not exceeding 3% as agreed otherwise the total drawing should be adjusted accordingly. We trust that the above is very fair and reasonable and upon hearing from you affirmatively, we shall include the additional clauses and duly sign the Contract.

As to the date of shipment, we would like you to alter to May and June respectively, as our s.s. 'Fuching' has been delayed.

Very truly yours,

Y. N. SHEN"

On 8th April, 1964 plaintiffs sent defendants a telegram (Exh. 12) in the following terms:—

"YRLET 4th AGREE INSERTION CONTRACT CLAUSE 3% SHORT MEASUREMENT AND GUARANTEE FREE TEREDOSE STOP AGREE SURVEYORS MEASUREMENT IF OVER 3% SHORTAGE BUT L/C MUST BE 100% AS BEFORE BECAUSE WHEN CONTRACT CLOSED NO SUCH CONDITION AND NO EXPORTERS ACCEPT BELOW 100% L/C PLEASE REPLY."

Eventually on 29th April, 1964 defendants wrote (Exh. 6) to plaintiffs informing them that they considered the transaction unsuccessful and they would not be allocating any vessel.

Miss Lee argued that it is immaterial whether defendants signed the contract or not as there was already a binding contract. She submitted that the signing was merely a formality. Similarly she contended that any term of payment different from the terms to be construed from the five documents are not a material term of the contract but merely relate to the mode of payment. I do not agree with her contention. Plaintiffs would appear to want the contract in writing. They thought the telegram (Exh. 3) not very clear. They sent the contract to defendants on their own initiative. If the contract is merely a formality to put, so to speak, into more correct form a completed agreement then it must be subject to no alteration either by adding or omitting a substantial term to it. Once plaintiffs omitted a substantial term they opened the door for negotiation and they could not blame defendants for negotiating. Defendants refused to sign the contract and properly pointed out the omission and stating their terms of payment in view of their previous dealing with plaintiffs.

There is no dispute as to the mode of delivery. Defendants were ready to allocate a vessel by middle of May for first shipment and to establish letter of credit. It was not disputed that parties agreed that payment was to be made by letter of credit. But they could not agree as to the terms of payment. I consider that the terms as to the

conditions of payment are material terms. After all a considerable sum of money was involved in the transaction.

Mr. Nayar conceded that the only thing parties agreed was the price. He argued that other terms are still under negotiation. Defendants suggested the mode of payment to ensure that they were protected for short shipment unless plaintiffs could put up some sort of guarantee then they would agree to release full payment. But plaintiffs were not prepared to give such guarantee (Exh. 20). It was submitted that the whole correspondence must be looked at and not to part of it only.

I pause here to say that references were made to various sections particularly section 4 of the Sale of Goods Act, 1893. It has not been disputed that the said Act is of general application by virtue of section 2 of the Application of Laws Ordinance (Cap. 2). However section 4 of the said Act had been repealed by section 2 of the Law Reform (Enforcement of Contracts) Act, 1954. The latter Act is specified in the Schedule under section 3 of the said Ordinance to be in force as from 1st January 1955. Therefore references to section 4 and in fact to other sections of the Sale of Goods Act 1893 are not of much assistance in this case at this stage on the question as to whether or not there is a binding contract between the parties.

I think Mr. Nayar's submission that the Court must look at the whole correspondence between the parties is a correct statement of the law. This principle was laid down by the House of Lords in *Hussey* v. *Horne Payne.*[1] This was followed in *Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs* [2] where plaintiffs prayed for an order of specific performance against defendant and relying on two letters, one written by defendant to plaintiffs offering to sell their business, and the other a reply from plaintiffs accepting the offer. Defendant's solicitors then sent plaintiffs a formal memorandum of agreement comprising several terms not expressed in the two letters. Plaintiffs' solicitors added a clause restricting defendant from carrying on a similar business within certain limits. A correspondence then followed between the two solicitors. Eventually defendant's solicitors withdrew the offer. In *Bristol's Case* [2] at page 622 Kay, J. referred to that part of Lord Cairn's judgment in *Hussey's Case* [1] which read:—

"It is one of the first principles applicable to a case of the kind, that where you have to find your contract, or your note or memorandum of the terms of the contract in letters, you must take into consideration the whole of the correspondence which has passed. You must not at one particular time draw a line and say, 'we will look at the letters up to this point and find in them a contract or not, but we will look at nothing beyond.' In order fairly to estimate what was arranged and agreed, if anything was agreed between the parties you must look at the whole of that which took place and passed between them."

It may well be that if you look at the five telegrams alone without any knowledge of the other facts of the case they might lead you to think that they amounted to a complete agreement. But there were other terms which at the time had not been agreed upon and efforts made to settle the terms were unsuccessful.

I agree with the view expressed in *May* v. *Thomson* [3] that *Hussey's Case* [1]

"shews that we must look at the correspondence from beginning to end. Of course if we find a few letters which are perfectly plain in themselves, which shew an agreement, and the parties do not follow them up by further correspondence, we have a comparatively easy case; but where each letter is followed immediately by another which suggests something else as a topic of further discussion, it becomes most dangerous to draw a line after any particular letter."

In *Bristol's Case* [2] plaintiffs' solicitors had themselves shown that the agreement was not complete by stipulating afterwards for an additional term thus keeping the whole matter in a state of negotiation. Whereas in this case plaintiffs wanted the contract to be in writing and omitted to insert in the contract an important term which was agreed previously. It was held in the former case that in such circumstances defendant was at liberty to withdraw his offer. That case also shows that the negotiation of an important term was enough to indicate that the contract was not complete. I hold in this case that plaintiffs by omitting an important term in their contract kept the whole matter in a state of negotiation only and that defendants were justified in the circumstances in withdrawing their offer.

For reasons given I therefore hold that there is no binding contract existing between the plaintiffs and the defendants. Accordingly plaintiffs' claim is dismissed with costs to be taxed. Judgment for defendants.

Claim dismissed.

LING KAI HUAT v. PUBLIC PROSECUTOR

[A.Cr.J. (Lee Hun Hoe J.C.) September 8, 1964]

[Sibu — Criminal Appeal No. CA/4 of 1964]

Criminal Law — Offensive weapon — Offence of going armed with an offensive weapon — Mere possession of offensive weapon not an offence — Credibility of witness — Duty of Magistrate — Minor Offences Ordinance (Cap. 56), s. 31.

The appellant appealed against his conviction for an offence of going armed with an offensive weapons to wit a pen knife and metal pipe an offence under section 31 of the Minor Offences Ordinance.

Held: (1) the mere possession of an offensive weapon in a public place is not an offence; it can only become an offence when it is for otherwise than a lawful purpose;